Supreme Court, U.S.
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No. 00-1800

IN THE
SUPREME COURT OF THE UNITED STATES

KIA P., individually and on behalf of MORA P., an infant,

Petitioners,

-v.-

ROSEMARY MCINTYRE, individually and as caseworker, Child Welfare Administration, DOREN DELAMOTHE, individually and as supervisor, Child Welfare Administration, NEW YORK CITY, LONG ISLAND COLLEGE HOSPITAL and SUSAN MORANCE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a private hospital, which holds an infant for medical reasons -- namely the danger that the infant is experiencing methadone withdrawal, a potentially fatal condition -- is not a state actor for purposes of 42 U.S.C. section 1983?

2. Whether the Court of Appeals correctly held that the hospital's failure to initiate a hearing regarding the infant's custody did not violate petitioners' procedural due process rights to a prompt post-deprivation hearing, where the infant was held only for one or two days after medical clearance?

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COUNTER-STATEMENT OF THE CASE

Municipal respondents Rosemary McIntyre, Doren Delamothe and New York City ("municipal respondents") respectfully request that this Court deny the petition by petitioners Kia P. and her daughter Mora P. ("petitioners") for a writ of certiorari to review the opinion of the United

States Court of Appeals for the Second Circuit in this case (Pet. App. at B1-27).

The Second Circuit unanimously affirmed the October 30, 1998 judgment of the United States District Court for the Eastern District of New York (Block, J.), which had dismissed petitioners' action against municipal respondents and hospital respondents (Pet. App. at C1). In affirming, the Second Circuit held that respondent Long Island College Hospital, a privately owned and operated hospital, was not a state actor while holding petitioner Mora, a newborn, for eight or nine days for medical reasons -- the danger that she was experiencing methadone withdrawal, a potentially fatal condition.

The Court held that the hospital could be treated as a state actor only after it had medically cleared Mora and was holding her for one to two additional days, while it informed the Child Welfare Administration of New York City's Human Resources Administration of the medical clearance and received word that, as far as the agency was concerned, Mora could be discharged. The Court held, however, that the hospital's failure to obtain a hearing during that day or two did not violate petitioners' rights to a prompt post-deprivation hearing.

This Court should deny review. Contrary to petitioners' claim, the Second Circuit's decision as to state action does not conflict with this Court's decisions or those of other Circuits. Additionally, there is no split in the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors.

Events of March 27 to April 8, 1993

On March 27, 1993, petitioner Kia P. arrived in labor at Long Island College Hospital -- a privately owned and operated hospital -- was admitted, and gave birth later that day to a baby girl, Mora (80-81, 224, 1014).[1] Kia P. informed hospital employees upon admission that she was HIV positive and also gave hospital employees medical records from North Central Bronx Hospital, which indicated past narcotics abuse (crack/cocaine), syphilis and possible TB exposure (82, 92, 94, 97-98, 104-06, 209-10, 252, 546, 590-91, 617, 880, 1015).

Because of Kia P.'s medical history, the hospital took a sample of Mora's urine and performed a toxicology screening test, pursuant to hospital policy and generally accepted medical procedures (205-06, 210-12, 546). Indeed, petitioners' own medical expert Marjorie Nicholson, a certified nurse midwife who knew Kia P. through Kia P.'s participation in a prenatal study at North Central Bronx Hospital, testified that a past history of drug abuse is a reason for testing an infant's urine and that Mora's urine probably would have been tested if Kia P. had given birth at North Central Bronx Hospital (267-68, 449, 461, 472). On March 29, 1993, hospital respondent Susan Morance, a hospital social worker, was informed that Mora's urine had tested positive for methadone (77, 82, 744).

As soon as the positive methadone result was received, hospital neonatologists and pediatricians placed Mora, who was considered "high risk for withdrawal," under medical observation for symptoms of methadone withdrawal. This was pursuant to their policy of

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[1] Unless otherwise indicated, numbers in parentheses refer to the pages of the Joint Appendix in the Second Circuit.

monitoring for a minimum of one week infants who test positive for methadone (79, 197-98, 213-14, 245, 247-48, 276-77, 280-81, 546). Hospital records indicated that Mora thereafter exhibited symptoms consistent with methadone withdrawal, such as irritability and tremors, on March 29-31, April 4 and possibly even as late as April 6 (86, 214-17, 243, 276, 278, 282, 284, 385-86, 395, 431, 546-47, 559, 567). In addition to being closely monitored, Mora was treated with swaddling, a semi-tight wrap that gives the infant a sense of comfort and security (277, 391, 546, 564).

Methadone withdrawal symptoms can present themselves up to approximately two weeks after an infant's birth, and can come and go. If an infant has been exposed to extreme doses of methadone, withdrawal can cause seizures or death (248, 280, 546-47, 563). Petitioners' expert Nicholson concurred that a finding of a positive urine toxicology is "very serious" — that "there is no getting around the fact that the urine shows methadone"; that infants exhibiting withdrawal symptoms, such as tremors and irritability, should remain in the hospital; and that symptoms of methadone withdrawal can occur up to two weeks after delivery (262-69). Symptoms consistent with methadone withdrawal can also be the result of causes other than methadone withdrawal (215, 563-64, 1035, 1096).

On March 29, 1993, the same day that the results of the drug test were received, hospital social worker Morance told Kia P. of the positive drug test and that, because of the test, Mora could not be discharged. Kia P. admitted that she had used crack/cocaine two years earlier, but denied that she had used methadone during her pregnancy (82, 195, 602-03, 752). After her conversation with Morance, Kia P. called her lawyer at Brooklyn Legal Services, who subsequently contacted both the hospital and the City's Child Welfare Administration ("CWA"), on Kia P's behalf

(88, 225, 768-69, 817-18). Throughout Mora's hospital stay, Kia P. was kept informed of Mora's medical condition and was allowed to visit and feed Mora (377-78, 385-86, 391-92, 395-96, 547, 606).

On March 29, pursuant to state statutory requirements, the hospital social worker also orally notified the New York State Central Registry for Child Abuse of the positive drug test, and the Central Registry, in turn, notified CWA (77, 83-84, 193-94, 196, 546). Pursuant to CWA's statutory mandate, municipal respondent Rosemary McIntyre, a CWA caseworker, immediately conducted an investigation, including a home visit on March 30, 1999, to evaluate the P.s and their home environment (126, 146, 148, 220-21). Mora's father informed McIntyre that he had used crack in the past, but denied using any type of drugs in the past two years (148). Kia P. also informed McIntyre that she had two other children, one who had been adopted and the other who was in foster care (150). McIntyre found that the apartment was nicely furnished and clean and that the P.s had a crib, ample clothing and food (146).

After the home visit, municipal respondent McIntyre informed hospital social worker Morance that Kia P. adamantly denied using methadone, and was told by the social worker that the doctors wanted to keep Mora under observation for methadone withdrawal (151, 220, 224-25). McIntyre remained in contact with the hospital social worker throughout the time that Mora remained in the hospital, to stay informed of Mora's medical status and when she would be medically ready for discharge (84-85, 87, 151-52, 227, 807-08). McIntyre also sent Kia P. and her husband to be tested for drugs, with their permission (151, 220-21, 647, 651-52).

Also on March 29, pursuant to routine hospital practice when a mother denies the use of drugs, as well as at Kia P.'s request, the hospital laboratory sent Mora's

urine specimen to SmithKline Beecham, an outside laboratory, for confirmation (85, 88, 238-39, 443, 754, 964). Due to the small quantity of urine, however, SmithKline Beecham did not have the facilities necessary to perform the test and, at the direction of the hospital, forwarded the urine to National Medical Services for microanalysis, using a gas chromatography/mass spectrometry test (85, 202, 239, 443, 985-86). On April 7, 1993, the hospital was informed that National Medical Services could not confirm the presence of methadone in Mora's urine specimen (218, 239, 255, 443, 562-63, 986-89).

Dr. Bjornson, the Section Chief of the hospital's Clinical Chemistry Laboratory (941), indicated that, in 1993, it was "very rare" — i.e., in much less than ten percent of the cases — that the confirmatory test did not confirm the presence of drugs (965). Additionally, Dr. Kamal, a pediatric resident at the hospital (865), stated that in the three years that he had worked in the hospital since Mora was discharged, he was unaware of any false positives (923).

Yet, according to plaintiff's expert Dr. John Morgan, an internist and professor of pharmacology (520), the screening test used by the hospital was imprecise and phenergan, an antihistamine that had been given to Kia P. during labor, very likely accounted for the first positive result (518). Nonetheless, Dr. Morgan was unwilling to state that opinion to a reasonable degree of medical certainty, and also admitted that he did not know when the last dose of phenergan was given, what the dose was or how long it takes for phenergan to travel through the placenta to the infant (522-23). The information sent out by the manufacturer of the EMIT screening test indicated that phenergan, also known as promethazine, does not

cross-react — i.e., show a positive response — at 75 micrograms per milliliter (960-61, 436).

An article written by Dr. Morgan entitled, "Problems of Mass Urine Screenings for Misused Drugs," indicated that many drugs cross-react to cause false positives on the screening test, but also admitted that most of these positives occurred at concentrations of the tested drugs that are not achievable in human urine and hence, are not practical problems (1072, 1067). The only specific reference to false positives involving methadone, in a subsection entitled "False Positives (or Unconfirmed Positives) in the Real World," was a 1974 study, which found that the screening test had a 2.6 % false positive rate for methadone (1074). Dr. Morgan admitted that the EMIT screening test is useful as a screening test, but should be independently confirmed through a gas chromatography/mass spectrometry test, as was done in this case (524, 1074).

Either on April 6 or April 7, the treating physicians medically cleared Mora for discharge, changing her status to "alternate level of care" ("ALC") (89, 253, 283, 547, 818-20, 827-28, 908, 925). On April 7, 1993, the hospital social worker informed CWA that Mora was medically cleared for discharge (89, 226, 236, 547), pursuant to the policy of CWA and the hospital that, when a child is in the hospital and there has been a report to the State Central Registry, CWA's permission is needed before the child can be discharged (1064, 1042 ¶J, 792).

It is uncontroverted that CWA determined that same day that it did not intend to take any action with respect to Mora, in light of its investigation and the fact that the drug tests of Kia P. and her husband had come back negative (222, 233). (The drug test results appear to have been received by the clinic that performed the tests on April 4 and 6 [169-70]). Due to the lateness of the hour, CWA's

caseworker McIntyre was unable to contact the hospital social worker (222, 227). On April 8, 1993, McIntyre contacted the social worker and advised her that CWA did not intend to take any action with respect to Mora (90, 152, 226). Mora was discharged from the hospital that day (79).

The Absence of a CWA "Social Hold"

CWA case worker McIntyre explained that a "social hold" is a direction from CWA not to allow a patient to go home, after the doctor has medically cleared the patient (223). McIntyre and her supervisor Doren Delamothe both gave deposition testimony, and CWA's case records indicate, that CWA never placed a "social hold" on Mora (120-89, 222-23, 230-31).

Kia P. also admitted that CWA never used the term "social hold," only the term "medical hold" (677). Kia P. stated that CWA had told her that the hospital had placed a hold on the baby and was waiting for the results of Mora's confirmatory test (643-44, 650, 652-53, 661, 671-72, 677). According to Kia P., only the hospital social worker and a doctor had told her at some point that she could not take her daughter home, because the hospital had found methadone in her urine and because Mora was under a "social hold" (602-04, 677-78, 680-82, 711-12). The doctor, however, also said that the "social hold" was by the hospital's social worker (680-82).

The hospital social worker denied having used the term "social hold" and explained that Mora had to remain in the hospital, because she was not medically cleared, given the positive methadone toxicology and the resulting medical observation, and because a report had been made to the State Central Register (774-76, 808, 843-44). The hospital social worker further explained that she would have had discretion to wait until the confirmatory test was received from the outside laboratory, before reporting

Mora's case to the State Central Register, because Mora had to remain in the hospital for medical reasons anyway (779-80). The hospital social worker emphasized that, even if CWA had submitted discharge plans prior to April 7, Mora could not have been discharged before receiving medical clearance, and that she did not have, and would not have had, any discussions with CWA about Mora remaining in the hospital, before Mora was medically cleared (199, 801, 847-48). It was only once Mora was medically cleared that the hospital needed CWA's approval before releasing her (199-200, 786, 801-02, 812-13).

Additionally, while Mora's hospital chart contained entries reflecting that she was on "social hold" (79), Dr. Kamal, admitted that he had mistakenly made the entry, because he was not familiar, at the time, with the terms "medical hold" and "social hold"; that Mora was, in fact, on medical hold; and that it was impossible to be on a social and medical hold at the same time (242-43, 248, 279, 880-81, 886-88, 927-28).

This Action

In 1994, petitioners brought this action for damages and injunctive relief, pursuant to 42 U.S.C. section 1983 and New York state law, alleging *inter alia* the wrongful detention of Mora by hospital respondents and municipal respondents (17-32). Both municipal respondents and hospital respondents moved for summary judgment (65-66, 285-86).

District Court Decision

In granting respondents' motions for summary judgment and dismissing the complaint, the District Court held, as an initial matter, that the hospital's practices were sufficiently entwined with City policy to warrant treating hospital respondents as state actors for purposes of the section 1983 claims (Pet. App. at D9-11). The Court

explained that merely providing medical care to Mora would not subject hospital respondents to liability under section 1983 (*id.* at D11). The Court, in fact, found that the hospital personnel continuously monitored Mora to determine whether she was suffering from methadone withdrawal, and that hospital records indicated that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal (*id.* at D3-4).

The Court, however, found that the hospital had done more than simply treat Mora (Pet. App. at D10). The Court found that the hospital had implemented a policy of holding children who were the subject of child abuse investigations, even if there was no medical reason for doing so, until it received notification from CWA that its investigation was complete (*id.*). The Court found that but for the actions of the hospital in holding Mora, CWA presumably would have needed to take some action to detain the child or would have needed to determine on an expedited basis whether she should have been released (*id.*).

Notwithstanding its conclusion that the hospital was a state actor, the District Court held that neither hospital respondents nor municipal respondents had violated petitioners' constitutional rights and that the factual issues identified by petitioners did not affect the availability of summary judgment (Pet. App. at D22). That is because, even if these issues were resolved in petitioners' favor, they did not give rise to questions of fact that required a trial of the constitutional claims (*id.*).

With regard to procedural due process, the District Court held that no pre-deprivation hearing was required, because the positive toxicology screen gave respondents an adequate emergency basis for detaining Mora, since the initial results provided an objective basis for the hospital's concern that Mora had been exposed to drugs in utero (Pet.

App. at D15-16). The Court also held that no post-deprivation hearing was required, because, in light of the imminence of the confirmatory test results and the probability of confirmation, there was a minimal risk that petitioners would be erroneously deprived of their liberty interests, and there was no pragmatic reason to implement any procedural safeguard (*id.* at D16-18). Additionally, the Court found that while respondents awaited the expected confirmatory test results, their interest in protecting Mora from the risk of child abuse continued (*id.* at D18). The Court also noted that "there is a fair amount of precedent for rejecting procedural due process claims based upon comparable periods of delay under related circumstances" (*id.* at D18).

The District Court further held that respondents had not violated petitioners' rights to substantive due process, Fourth Amendment protection or an adequate child abuse investigation, and had not discriminated against Kia P. based on her HIV status (Pet. App. at D13-15, D18-22). Finally, the Court held that municipal respondents McIntyre, the CWA caseworker, and Delamothe, her supervisor, were entitled to qualified immunity (*id.* at D23-27).[2]

Having dismissed the constitutional claims, the District Court declined to exercise supplemental

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[2] The Court also held that municipal defendants Sabol and Little, the Commissioner of the City's Department of Social Services and the Executive Deputy Commissioner of CWA, respectively -- who are not parties to this petition -- were not liable in their individual capacities, because there was no evidence in the record that they were personally involved in the actions giving rise to this case (49 ¶¶8, 11; Pet. at ii, App. at D23).

jurisdiction over petitioners' state law claims (Pet. App. at D28). In a second amended judgment, the Court also dismissed respondents' cross-claims as moot, in light of the dismissal of petitioners' entire complaint (*id.* at C1-2).

Court of Appeals Decision

By opinion entered December 5, 2000, the Court of Appeals for the Second Circuit unanimously affirmed the dismissal of the action. Judge Sack wrote the opinion, in which Judge Feinberg joined (Pet. App. at B1). Judge Van Graafeiland concurred in the result (*id.* at B27).

As an initial matter, the Second Circuit concluded based on the evidentiary record that between the receipt of the first positive test and Mora's ultimate medical clearance eight or nine days later, Mora was held for medical reasons, not concerns about possible parental mistreatment or any CWA policies (Pet. App. at B4-5, B12 n.2). The Court emphasized that the medical staff made the initial decision to withhold Mora's release because of its belief that Mora had methadone in her bloodstream and was in danger of methadone withdrawal, a potentially fatal condition (*id.* at B4-5, B11). Like the District Court, the Circuit noted that the hospital records indicated that Mora exhibited tremors and irritability, which are symptoms consistent with methadone withdrawal (*id.* at B4-5, B11).

The Second Circuit further found that Mora was medically cleared for discharge on April 6 or 7, due to the combination of the second laboratory report, which failed to confirm the positive result of the hospital's methadone test, and Mora's apparent good health at that time (Pet. App. at B5, B11). The Court found that it was only after the medical clearance that the hospital's medical staff told hospital social worker Morance that Mora was medically ready to leave the hospital (*id.* at B5, B11). Morance then informed CWA caseworker McIntyre of the clearance, and

CWA decided that it would not seek custody of Mora (*id.* at B5-6). The Court found that CWA caseworker McIntyre returned Morance's call, but was unable to reach her because she had left for the day (*id.* at B6). McIntyre succeeded in contacting Morance the next day, April 8, and informed her of CWA's conclusion that Mora should be discharged (*id.*). Mora was discharged from the hospital that day, a day or two after the medical clearance (*id*).

As a result of these evidentiary findings, the Second Circuit held that the hospital's actions until April 6 or 7 -- testing Mora's urine for methadone, holding and treating Mora for methadone withdrawal, and medically clearing Mora after the negative confirmatory test -- were taken in its capacity as a private provider of medical care, not as a state actor (Pet. App. at B11).

The Second Circuit held that the hospital was subject to liability as a state actor, only after Mora had been medically cleared on April 6 or 7 (Pet. App. at B12-15). The Court found that at that point, after having informed CWA of the medical clearance, the hospital was holding Mora solely in its social welfare role, until CWA informed the hospital on April 8 that it would not seek custody of Mora (*id.*). Hence, the Court held that during this one or two day period after medical clearance, the hospital was subject to liability under section 1983.

The Second Circuit, however, held that hospital respondents did not violate petitioners' procedural due process rights to a prompt post-deprivation hearing, by holding Mora for that additional day or two after she had been medically cleared, while seeking CWA's advice as to her release (Pet. App. at B20-21). Additionally, the Court explained that a pre-deprivation hearing, which is required in non-emergency situations, was not possible in this case (*id.* at B21 n.4). That is because at the moment the hospital's custody became state action -- upon Mora's

medical clearance -- the hospital already had custody of Mora (*id.*).

The Second Circuit noted that had the hospital held Mora the entire ten days without a hearing solely for purposes of protecting her from possible abuse or improper parental care, there is a serious danger that the hospital, as a state actor, would have violated petitioners' procedural due process rights (Pet App. at B23). The Court emphasized, however, that municipal respondents would be entitled to summary judgment in any event, because there was no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing (*id.*). The Court found that no CWA employee ever directed the hospital to hold Mora against her parents' wishes pending the CWA investigation. Further, while CWA had a policy prohibiting hospitals from releasing children under CWA investigation without CWA permission, the Court found that there was no evidence that Mora was detained pursuant to that policy (*id.*).

Finally, the Second Circuit held that respondents did not violate petitioners' rights to substantive due process, protection under the Fourth Amendment, or equal protection (Pet. App. at B15-18, B23-27). The Court did not reach the issue of qualified immunity.

By order entered on February 26, 2001, the Second Circuit denied petitioners' application for rehearing and rehearing in banc (Pet. App. at A1-2).

REASONS FOR DENYING THE PETITION

I.

THE SECOND CIRCUIT'S DECISION AS TO STATE ACTION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR THOSE OF OTHER CIRCUITS.

Contrary to petitioners' claim (Pet. Pt. I, pp. 10-17),[3] the Second Circuit's decision as to state action does not conflict with the decisions of this Court or the Eleventh Circuit. Rather, petitioners' claimed conflict is based only on their disagreement with the Second Circuit's conclusion, based on a review of the evidentiary record, that the hospital was holding Mora for medical reasons until April 6 or 7, not due to a CWA policy or concerns about child abuse.

[3] Interestingly, petitioners did not raise the issue of state action in their application for rehearing and rehearing in banc in the Second Circuit.

Such disagreement, however, does not render this case worthy of certiorari. It is well settled that a case which turns only upon an analysis of the particular facts involved is not worthy of certiorari. *See, e.g., NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981) (dismissing the writ of certiorari as improvidently granted, because it primarily presented an analysis of the factual evidence in the record, which did not merit this Court's review); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924) (dismissing the writ of certiorari, where the controverted issue primarily presented a question of fact as to the sufficiency of the evidence).

In this case, as previously discussed, the Second Circuit held that Mora was held for medical reasons until she was medically cleared by the hospital on April 6 or 7, not concerns about possible parental mistreatment and CWA policies (Pet. App. at B5, B11-12 & n.2). The Court found that the medical staff made the initial decision to withhold Mora's release and observe her for methadone withdrawal -- a potentially fatal condition, which can take a minimum of one week to manifest itself (*id.* at B4-5). The Court also found, based on the undisputed hospital records, that Mora exhibited tremors and irritability -- symptoms consistent with methadone withdrawal (*id.* at B4, B11; 86, 214-17, 243, 276, 278, 282, 284, 385-86, 395, 431, 546-47, 559, 567). The Court's findings that the hospital medically monitored Mora for methadone withdrawal and that Mora exhibited symptoms consistent with methadone withdrawal, were also reached by the District Court (Pet. App. at D3-4, D16).

Further, the Second Circuit held that there was no evidence that CWA or any of its employees proximately caused Mora to be kept from her parents without a hearing (Pet. App. at B23). The Court explained that no CWA employee ever directed the hospital to hold Mora against her parents' wishes pending the CWA investigation (*id.*). Additionally, while CWA had a policy prohibiting hospitals from releasing children under CWA investigation without CWA permission, the Court found that there was "no evidence" that Mora was detained pursuant to that policy (Pet. App. at B23).

The Court's conclusion that CWA did not proximately cause Mora's detention is supported by CWA records and the deposition testimony of CWA employees McIntyre and Delamothe, which both unquestionably indicate that CWA never ordered a "social hold" of Mora (120-89, 222-23, 230-31). Indeed, even Kia P. admitted that CWA employees never used the term "social hold," only the term "medical hold" (677). Further, the hospital social worker undisputedly testified that: (1) the hospital had discretion to wait for a positive confirmative test before reporting the case to the State Central Register, because Mora had to remain in the hospital for medical reasons anyway; (2) even if CWA had submitted discharge plans, Mora could not have been discharged before she was medically cleared; and (3) the hospital did not have, and would not have had, any discussions with CWA about Mora remaining in the hospital, before Mora was medically cleared (779-80, 199, 801, 847-48).[4]

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[4] As set forth in municipal respondents' brief in the Second Circuit, any alleged statements by hospital employees and notations in the hospital record that Mora was under a CWA "social hold," both of which were either denied or explained as mistakes by the hospital employees

Petitioners disagree only with the Second Circuit's above-discussed evidentiary conclusions. Petitioners claim, for example, that the "Second Circuit disregarded the substantial evidence of [] CWA's involvement in the detention of the child and the governmental function the hospital was performing." *See* Pet. Pt. I at 15. Even petitioners' "questions presented for review" frame the issues as if the hospital had acted in concert with, and at the behest of, CWA (*id.* at i). Likewise, petitioners also claim that the Second Circuit's "factual conclusion," that CWA did not proximately cause Mora to be kept from her parents without a hearing, "was unwarranted by the evidence" and "improper on a motion for summary judgment. " *See* Pet. Pt. I at 17. Hence, even petitioners concede that their disagreement with the Second Circuit's decision involves only a dispute as to the evidentiary record -- a routine summary judgment issue, which is not worthy of certiorari.

Contrary to petitioners' claim (Pet. at 10-15), there is no conflict between the Second Circuit's decision as to state action and this Court's decision in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924 (2001). In *Brentwood*, this Court held that a statewide interscholastic athletic association's regulatory activity constituted state action, due to the pervasive entwinement of state school officials in the association's structure, with the result that there was such a "close nexus" between the State and the association that their identities largely overlapped. 121 S.Ct. at 930-34.

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themselves, cannot be treated as admissions by CWA under the Federal Rules of Evidence. *See* Mun. Resp. Br. at 20.

For example, this Court relied, *inter alia*, on the facts that: (1) public high schools represented 84% of the association's voting membership; (2) the association was designated by the State to provide an integral element of public schooling -- interscholastic athletics; (3) members of the State Board of Education sat on the association's governing bodies; and (4) association employees could join the state retirement system. *Id.* at 932-34. This Court repeatedly emphasized that the issue of when a private actor can be treated as a state actor is necessarily a fact-bound inquiry. *Id.* at 930, 932. As discussed in detail by hospital respondents, this Court's analysis in *Brentwood* is consistent with this Court's previous holdings regarding state action. *See* Hosp. Resp. Br. in Opp. at 8-9.

The Second Circuit's decision in this case is consistent with *Brentwood*. In fact, the Second Circuit cited the entwinement test for state action in its decision (Pet. App. at B13). The Second Circuit also cited this Court's decision in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), which employed the same "close nexus" test as in *Brentwood*, and held that private nursing homes' decisions to discharge or transfer Medicaid patients to a lower level of care did not constitute state action, where, *inter alia*, the decisions involved medical judgments made by private physicians (Pet. App. at B11).

Thus, the Second Circuit followed this Court's precedent and employed the same tests as in *Brentwood*. The Court simply concluded, based on the factual evidence, that the refusal of the hospital to release Mora for reasons relating to child abuse and child welfare laws -- the entwinement -- did not become effective until after the medical clearance.

Similarly, contrary to petitioners' claim (Pet. Pt. I at 15-17), there is no conflict between the Second Circuit's decision and the Eleventh Circuit's decision in *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991). In *Bendiburg*, the Eleventh Circuit held that there were genuine issues of material fact as to whether private treating physicians and nurses had acted in concert with the State. That is because those defendants may have intentionally exaggerated the emergency nature of a boy's medical condition for the purpose of allowing the State to obtain temporary custody of the boy from his father, who would not consent to a certain medical procedure. *Id.* at 469.

In this case by contrast, as previously mentioned, the Second Circuit found that hospital respondents were holding Mora for legitimate medical reasons, and municipal respondents were not involved in any way in Mora's medical treatment. Again, petitioners' claimed split is based on the factual assumptions, either that hospital respondents were holding Mora for child protective reasons at municipal respondents' behest -- not for legitimate medical reasons -- or that hospital respondents were primarily holding Mora for governmental reasons and only incidentally treating her. These assumptions, however, are not borne out by the record.

In short, the Second Circuit's decision does not conflict with the rulings of this Court or of the Eleventh Circuit, and this Court's decision in *Brentwood* would not have led to a different result had it been available at the time of the Second Circuit's decision. Rather, petitioners merely disagree with the Second Circuit's review of the factual evidence, which is certainly not a reason to grant the petition.

II.

THERE IS NO SPLIT AMONG THE CIRCUIT COURTS AS TO THE APPLICABILITY OF PROCEDURAL DUE PROCESS TO DEPRIVATIONS OF PARENTAL CUSTODY BY STATE ACTORS.

Contrary to petitioners' claim (Pet. Pt. II), there is no split among the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors. Indeed, the procedural due process standards are well settled in all of the Circuits.

In analyzing the procedures that were due to petitioners in this case, the Second Circuit applied this Court's well-established three-factor test from *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), where this Court emphasized that due process, unlike some legal rules, is flexible and not a technical concept with a fixed content unrelated to time, place and circumstances. *See* Pet. App. at B18-19. The Second Circuit then explained that petitioners' due process claims were governed by those cases, where, as here, a parent has initially voluntarily granted temporary custody of a child to a third party, and a state actor, although not physically taking the child away, gains custody by refusing to release the child. The Second Circuit held that in those cases, the state has a duty to initiate a prompt post-deprivation hearing. *Id.* at B19-20.

The Second Circuit found that the hospital had not denied petitioners' rights to a prompt post-deprivation hearing, by holding Mora for one or two days without a hearing, after she was medically cleared. *See* Pet. App. at B21. The Court explained that that short time period was used by CWA to decide promptly whether to take any

action with respect to Mora, after it had received news of the medical clearance and of the drug test showing an absence of methadone. *Id.* at B21. In particular, after hospital social worker Morance called CWA caseworker McIntyre on April 7 to inform her of the medical clearance, McIntyre discussed the case with her supervisor. The supervisor, in consultation with McIntyre, decided that same day that CWA did not intend to take any action with respect to Mora. Unable to reach hospital social worker Morance that day due to the lateness of the hour, McIntyre successfully made contact with Morance the following day, April 8, and informed Morance that, as far as CWA was concerned, Mora could be discharged. *Id.* Mora was released from the hospital that same day, April 8. *Id.* The Second Circuit concluded that the Constitution allows state actors at least one to two days of breathing room to determine what action should be taken after parent and child have been separated. *Id.* at B22.

The Second Circuit noted that while a pre-deprivation hearing is required in non-emergency situations, a pre-deprivation hearing was not possible in this case. That is because, at the point that the hospital became a state actor -- upon medically clearing Mora -- the hospital already had custody of Mora. *See* Pet. App. at B21 n.4.

Contrary to petitioners' claim, the Circuit decisions cited by petitioners employ the same general procedural due process analysis as the Second Circuit: a pre-deprivation hearing is required absent exigent circumstances, and post-deprivation hearings must be held promptly. Hence, petitioners' claimed split is non-existent.

See Bendiburg v. Dempsey, *supra*, 909 F.2d at 467-68 (holding that under certain emergency circumstances, a parent's custodial rights may be temporarily terminated without notice, provided a prompt, meaningful post-

deprivation hearing is held); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (holding that removal of a child from the custody of his or her parents requires pre-deprivation notice and a hearing, except in extraordinary or emergency situations that justify postponing the hearing); *Mabe v. San Bernardino County*, 237 F.3d 1101, 1106-07 (9th Cir. 2001) and *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (holding that, except in emergencies, government officials are required to obtain prior judicial authorization before intruding on a parent's custody and that post-deprivation proceedings must be prompt); *Whisman v. Rinehart*, 119 F.3d 1303, 1310-11 (8th Cir. 1997) (holding that when the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state must initiate an adequate and prompt post-deprivation hearing); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020-21 (7th Cir. 2000) (holding that, absent exigent circumstances, a predeprivation hearing is required before government officials remove a child, and that post-deprivation judicial review must be prompt and fair); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983), *cert. denied*, 465 U.S. 1033 (1984) (holding that removal of a child from a parent requires notice and a pre-deprivation hearing unless there are exigent circumstances, in which case a hearing is required promptly thereafter); *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (holding that the requirements of due process may be delayed in an emergency, provided that adequate post-deprivation process is promptly accorded); *Miller v. City of Philadelphia*, 174 F.3d 368, 372-74 & n.4 (3d Cir. 1999) (noting, in a case that involved an emergency removal, that initiating child custody proceedings by ex parte orders is

generally constitutional if a prompt post-deprivation hearing is held).[5]

Moreover, none of the Circuit decisions cited by petitioners found any procedural due process violation based on a one or two day hold or removal without a hearing. Indeed, in *Campbell v. Burt*, *supra*, 141 F.3d at 929, 931, the Ninth Circuit explicitly held that as of April 1993 -- the same time period involved in this case -- there was no clearly established federal case law that even a seven-day delay before obtaining post-deprivation judicial review would violate procedural due process.

See also Newton v. Burgin, 363 F. Supp. 782, 785-88 (W.D.N.C. 1973) (3 judge panel), *aff'd w/o op.*, 414 U.S. 1139 (1974) (holding that a statute did not violate the plaintiffs' due process rights, where the statute provided for a post-deprivation hearing on the merits within five business days after the state's assumption of custody); *Jordan v. Jackson*, *supra*, 15 F.3d at 344-53 (the Fourth Circuit holding that a delay of 65 hours [less than three days] in providing post-deprivation judicial review did not violate the parents' due process rights); *Miller v. City of*

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[5] The Fifth Circuit decisions cited by petitioners do not conflict with the other Circuits, but simply do not discuss the specific requirements of procedural due process, as they do not involve the timing of a required hearing. *See Morris v. Dearborne*, 181 F.3d 657 (5th Cir. 1999); *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000). The Fifth Circuit merely made the general statement that the Fourteenth Amendment grants parents the right to fundamentally fair procedures before having their child removed from their home. *Morris*, 181 F.3d at 669 n.7.

Philadelphia, supra, 174 F.3d at 372 n.4 (the Third Circuit noting that its district courts have held statutes to be constitutional, which required a post-deprivation hearing within 72 hours).[6]

In short, there is no split among the Circuit Courts as to the applicability of procedural due process to deprivations of parental custody by state actors.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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[6] None of the Circuit decisions cited by petitioners involved the same factual scenario as here, where a predeprivation was not possible because Mora was already in the hospital's custody at the time the hospital medically cleared Mora.